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Diplomatic protection

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Report of the Secretary-General

Addendum

Comments and observations received from Governments

France

[Original: French]
[24 July 2007]

France would like to commend the International Law Commission for its useful work on the topic of diplomatic protection and, in particular, to congratulate the two Special Rapporteurs, Mr. Bennouna and Mr. Dugard, for their consistently detailed comments.

The Commission's consideration of the topic of diplomatic protection was very timely, as the sometimes very old customary rules governing the exercise of diplomatic protection lend themselves to codification. However, that exercise proved to be extremely problematic in the light of certain difficulties raised by diplomatic protection in international law. Thus, pursuant to the Secretary-General's invitation, France is pleased to be able to convey to him its comments on the draft articles adopted on second reading by the International Law Commission.

At the risk of repeating some of its oral comments during the annual consideration of the work of the Commission by the Sixth Committee of the General Assembly, France deemed it necessary to submit its general views on the draft articles as adopted by the Commission in 2006[1] before making some more specific comments on some of the articles proposed.

* A/62/150.

[1] France was not able to meet the deadline for the submission of written comments on the draft articles adopted on second reading by the Commission in 2004.

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General observations on the draft articles on diplomatic protection adopted on second reading in 2006[2]

That the issue of diplomatic protection falls within the broader framework of the law of international responsibility of States is indicative of the importance of the draft just finalized by the Commission. The Commission had chosen not to consider the topic of diplomatic protection in the final text of its articles on responsibility of States for internationally wrongful acts. Thus, the draft articles on diplomatic protection serve as a complement to the draft adopted in 2001 and should therefore be considered within the framework of the law of State responsibility in terms of the definition of the concept of diplomatic protection itself and its underlying rationale (see (a) below) as well as of its scope and further work on the topic (see (b) below).

(a) Definition of diplomatic protection and the underlying philosophy of the draft articles

The wording of article 1 appropriately emphasizes the close links between diplomatic protection and the law of State responsibility by characterizing diplomatic protection as a specific means for a State to invoke the responsibility of another State.[3] Indeed, diplomatic protection necessarily implies claims between States (commentary on article 1, para. 5). Broadly speaking, the Commission has usefully codified the most salient features of diplomatic protection, which it reiterates in draft article 2 and draft article 3, paragraph 1, is a right of the State of nationality of the injured person, in the light of the decision of the International Court of Justice in the *Mavrommatis Palestine Concessions* case. Thus, it was most appropriate that the well established principle in international law that a State has "discretionary power" to "decide whether its protection will be granted, to what extent it is granted, and when it will cease"[4] should be reiterated in the commentary on draft article 2 (commentary on article 2, para. 2).

While it is undeniable that they have positive features, the draft articles also raise some problems which relate mainly to the approaches taken. In some respects, the Commission appears to be oblivious of the specific nature of its topic, as it appears to extend it to include issues outside of its scope. France points out that the reasoning underlying several provisions of the draft articles, including draft article 8 and the so-called "recommended practice" in draft article 19, is more reflective of the concept of the legal protection of human rights than of diplomatic protection.

(b) Scope of the draft articles and further work on the topic

Ironically, the Commission chose to venture into other areas which traditionally fall outside the scope of diplomatic protection but failed to consider its topic fully. Indeed, as it states in the commentary on the draft articles, it elected to consider only "rules governing the admissibility of claims", eschewing a detailed

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[2] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49.

[3] The International Court of Justice recently considered that article one of the draft articles adopted by the Commission in 2006 reflects customary international law: *Ahmadou Sadio Diallo* case (*Republic of Guinea vs. Democratic Republic of the Congo*), *Preliminary objections*, Judgment of 24 May 2007, para. 39.

[4] Case concerning the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium vs. Spain*), *Second Phase, Judgment, I.C.J. Reports 1970*, Judgment of 5 February 1970, p. 44.

consideration of the legal consequences of the exercise of diplomatic protection or its possible relationship with functional protection. Moreover, the issue of remedies available to individuals before non-domestic courts might have deserved consideration as part of the review of the rules on the exhaustion of domestic remedies. It is the view of France that such omissions reduce somewhat the scope of the draft articles, which do not fully address the problems that the exercise of diplomatic protection might raise in modern practice.

In this connection, the draft articles adopted by the Commission should not end the consideration of this topic. This offers a perfect illustration of the view expressed by France with respect to the draft on responsibility of States for internationally wrongful acts. The importance of the doctrine of diplomatic protection as much as the approaches taken by the Commission amply suggest that States should consider such a topic during an international conference with the aim of adopting an international convention which would harmonize practices with respect to diplomatic protection.

In light of the above, France nevertheless wonders as to the appropriate scope of such a venture, in particular with respect to whether the draft articles adopted in 2001 on responsibility of States for internationally wrongful acts should be separated from those adopted in 2006 on diplomatic protection.

Comments on specific draft articles

In addition to the foregoing general comments on the general provisions adopted by the Commission in the first part of its draft articles, France wishes to comment on the other draft articles, as arranged in the Commission's draft.

(a) Nationality (Part Two of the draft articles)

Draft article 3, paragraph 2, and draft article 8

The provisions on exceptions to the principle that only the State of nationality of a person may exercise diplomatic protection on his behalf clearly fall within the scope of progressive development and no support can be found for it in State practice. Specifically, France wonders whether the right afforded to States to exercise their diplomatic protection in respect of persons recognized as refugees is compatible with some provisions of the annex to the 1951 Geneva Convention relating to the Status of Refugees, which provide that the issue of a travel document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue.

Draft article 4

In France's view, devoting an article to the definition of the State of nationality may entail considering the issue of the acquisition of nationality, which is part of domestic law and is distant from the issue of the exercise of diplomatic protection.

The "connecting factors" listed by the Commission in this article are not exhaustive and do not interfere with the sole jurisdiction of States in conferring nationality, subject to specific commitments they may enter into. At the same time, it is unfortunate for the Commission to provide, by a general reference to international law under draft article 4, that a State against which a claim is made on behalf of an injured foreign national may "challenge the nationality of such a person

where his or her nationality has been acquired contrary to international law" (see commentary on article 4, para. 7), without specifying the criteria for doing so. It should be observed further that a State may only challenge the enforceability of such nationality and not its attribution as such. In this connection, the Commission rightly appears to not wish to uphold the *Nottebohm* jurisprudence requiring an "effective link" as a general condition for asserting a nationality claim against another State in the context of diplomatic protection but offers little guidance as to the circumstances under which a State may reject such a claim.

Draft article 5

Draft article 5 is not acceptable except in as far as it reiterates in paragraph 1 the so-called continuous nationality rule. The Commission suggests a new approach whereby a State could present a claim in respect of a person who acquired its nationality "in a manner not inconsistent with international law" after the date of the injury (see draft article 5, para. 2), provided that the injury were not attributable to the former State of nationality (ibid., para. 3). When exercising diplomatic protection, a State asserts its right, which implies that at the time of the injury, the person must have the nationality of the State presenting the claim and which nationality may be asserted against third parties. Thus, the Commission took the problematic and not readily justified approach to challenge a well established rule of international law.

Draft article 6

No comment.

Draft article 7

There is no gainsaying that the general principle embodied in this draft article that a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national is acceptable. This rule, clearly laid down in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws is supported by State practice. However, the Commission's draft article provides for an exception to such a rule with the requirement that the nationality of the former State must be "predominant". In addition to the difficulties that may be inherent in defining the predominant nationality — indeed the Commission stops short of suggesting criteria therefor — suggesting only "factors to be taken into account", such approach interferes with the scope of the general principle.

In practice, the dominant or predominant nationality doctrine has been upheld only after major crises when it was necessary to compensate for harm suffered by "national economies" by dividing the total damage into a series of individual claims. The reactions to this doctrine and the weak support for it on the part of States of emigration cast doubt on its value as a general rule and on its applicability except in respect of matters where individual damages are considered only as bits and pieces of overall damages. Furthermore, in such cases it is unclear whether the actions taken could be invariably characterized as diplomatic protection.

Draft article 8

See comments on draft article 3, paragraph 2.

Draft article 9

Draft article 9, as adopted on first reading, seemed to be much more sound[5] in that it referred equally to the criteria of place of incorporation and place of registered office for the purpose of determining the State entitled to exercise diplomatic protection in respect of a company pursuant to the jurisprudence of the International Court of Justice in the *Barcelona Traction* case. In this connection, in the final draft of article 9, the Commission favours the incorporation criterion while it provides, but only as an exception, other criteria where there is no connection between a State where the company is incorporated and the company itself. In such a case, the Commission requires, as part of the criteria to be used, that both the seat of management and financial control criteria should be included among the criteria to be considered. However, where such criteria lead to two different States, the Commission is of the view that the State of incorporation remains the State entitled to exercise diplomatic protection (see commentary on draft article 9, para. 6). The approach finally taken by the Commission appears to avoid the serious concerns that would arise from cases of dual protection and competition among States relying on different connection criteria.

France is of the view, however, that any approach combining the place of incorporation with the place of registered office would lead to a similar result and would not significantly limit the exercise of diplomatic protection to the extent that in practice corporations usually establish their registered office in their State of incorporation. The combination of the two criteria could above all serve to limit the protection facilities that corporations seek by incorporating in tax havens. Even considered together with the exceptions set forth in the second sentence of draft article 9, the criterion of place of incorporation alone advocated by the Commission does not appear to achieve that goal, since the secondary criteria then considered might designate different States and ultimately make the State of the place of incorporation the only one capable of exercising diplomatic protection.

Another disadvantage of the cumulative criteria approach would be that a corporation that had established its registered office in a State other than the one in which it was incorporated would be left without protection. In order to cover that gap, France is of the view that, as a subsidiary consideration, the existence of genuine links between the corporation and the State of incorporation or the State of registered office should be taken into account. In that case, the State of nationality would be the State with which the corporation has the closest link.

Draft article 10

No comment.

Draft article 11

While the provisions of draft article 12 adequately reflect customary law relating to the diplomatic protection of shareholders by their State of nationality in the event of injury to their rights by a wrongful act, those of draft article 11 go to the essence of diplomatic protection by envisaging the protection of shareholders for

[5] "For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated and in whose territory it has its seat of management and financial control, or with whose territory it has a similar connection".

an injury caused by the corporation. In giving a negative formulation to this draft article, the Commission had wanted to stress that the State of nationality of the shareholders could exercise diplomatic protection only under exceptional circumstances in two situations which, according to the commentary, were "accepted" by the International Court of Justice in 1970 (see commentary on draft article 11, para. 3). France does not share this positive interpretation of the judgment in the *Barcelona Traction* case: while the International Court of Justice does refer to these two scenarios, it clearly indicates that it does not find it necessary to rule on their merits. Furthermore, the Court has recently held that State practice and decisions of international courts and tribunals "do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution" of shareholders by their State of nationality for the injury caused to a company.[6]

The provisions of draft article 11, including from the progressive development of law perspective, are not acceptable to France. In the first scenario, set out in draft article 11 (a), the State of nationality of the shareholders could exercise diplomatic protection "if the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury". This wording, ostensibly intended to provide an exception to the impossibility of providing protection, would actually create a very broad scope for entitlement to protection by the State of nationality of the shareholders.

Nor does France find draft article 11 (b) any more acceptable. Indeed, its provisions echo the passing reference by the International Court of Justice in the *Barcelona Traction* case to the fact that, for reasons of equity a "theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company". The Court did not rule on the validity of this theory.[7]

This hypothesis, if put into practice, would upset the balance between the advantages to the shareholders of owning stock in a company incorporated in a foreign State and the risk they assumed by accepting that the company had the nationality of that State. The existence of specific mechanisms under bilateral investment treaties, for example, would mitigate that risk. However, that is neither the purpose nor function of diplomatic protection.

Indeed, from the standpoint of general international law, that solution would call into question one of the most solid bases of diplomatic protection, which requires that a distinction should be drawn between the rights of the corporation, which are to be protected, and the interests of the shareholders, which are not. In other words, the proposed exception would undermine the very essence of the regime of diplomatic protection of corporations. Moreover, the exception fails to be admissible as a concession to equity. The Court in the *Barcelona Traction* case held that permitting the State of nationality of the shareholders the right to protect would create "a climate of confusion and uncertainty in international economic relations"

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[6] *Ahmadou Sadio Diallo* (*Republic of Guinea vs. Democratic Republic of the Congo*), *Preliminary objections*, Judgment of 24 May 2007, para. 89.

[7] In the *Ahmadou Sadio Diallo* case (*Republic of Guinea vs. Democratic Republic of the Congo*), *Preliminary objections*, the Court did not deem it necessary to rule on whether or not the exception provided for in article 11, para. (b), of the Commission's draft articles reflects customary international law, Judgment of 24 May 2007, para. 93.

and would disturb the balance between the advantages that a shareholder might obtain abroad and the risk the shareholder ran in investing capital in a corporation that was not of the same nationality.

Draft article 12

No comment.

Draft article 13

This draft article raises the interesting question of whether legal persons other than corporations can enjoy diplomatic protection. In principle, France sees no reason why they should not; however, State practice is too disparate to allow for the elaboration of specific rules in that regard. Moreover, the regime of diplomatic protection should not necessarily be the same for legal persons in general as for corporations. Therefore, France considers that it would be wise to replace article 13 by a clause in the general part of the draft articles which would state that their provisions were without prejudice to the exercise of diplomatic protection in the case of injury to a legal person other than a corporation.

(b) Local remedies (Part Three of the draft articles)

Draft article 14

France considers that draft article 14 adequately expresses the customary norm of exhaustion of local remedies. As the Commission states in its commentary (see the commentary on article 14, para. 5), the article refers only to judicial or administrative remedies available as of right and excludes remedies of grace and remedies whose purpose is to obtain a favour and not to vindicate a right.

Draft article 15

France has little to say on the subject of the exceptions to the local remedies rule, which are clearly set forth in draft article 15. It will simply note that the case envisaged in paragraph 15 (b) — that the respondent State is responsible for "undue delay" in providing the remedy — appears to be worded too broadly and ambiguously. In reality, such an exception would apply only if the delay amounted to a denial of justice. France therefore wonders whether draft article 15 (b) should really fall into the same category as the cases envisaged in subparagraph (a) of that article.

(c) Miscellaneous provisions (Part Four of the draft articles)

Draft article 16

No comment.

Draft article 17

France endorses the idea contained in this draft article; with respect to diplomatic protection, there is no reason to exclude the classic codification clause preserving the lex specialis. Application of a specific human rights regime can also preclude application of the general rules governing the diplomatic protection of natural persons, although that is not always the case.

As currently worded, draft article 17 gives the impression that the existence of special rules of international law is sufficient to preclude application of the general regime of diplomatic protection. The wording of this provision should be based on that of article 55 of the articles on responsibility of States for internationally wrongful acts. It would then stipulate that the draft articles do not apply "where and to the extent that the protection of corporations and shareholders (...) is governed by special rules of international law".

Draft article 18

No comment.

Draft article 19

While draft article 19 does not deal with customary rules, or even with the progressive development of the law, it does recommend to States practices that the Commission considers "desirable". While France notes that it was not the Commission's intention to enter the realm of positive law or to report on actual State practice, the Commission's recommendations do appear to give rise to confusion between the nature of diplomatic protection — a mechanism exercised by the State at its discretion in the course of its international affairs — and other, more specific mechanisms related to the international protection of human rights or foreign investment.